



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

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REPORT AND NOTICE OF ALLEGED VIOLATIONS OF THE IDAHO OPEN MEETINGS LAW WITH OPPORTUNITY TO CURE

July 25, 2019

This report is the result of an investigation into four complaints received by this office. The first was received from Briana LeClaire on June 24, 2019. The second was received on July 1, 2019 from Borton-Lakey Law & Policy on behalf of the Heritage Academy Public Charter School in Jerome, Idaho. The third was from the Jerome Public Charter School, dated July 21, 2019. The fourth was from Anderson, Julian & Hull, attorneys for several charter schools, and was received on July 2, 2019. All of the complaints question the validity of the Public Charter School Commission ("PCSC" or "Commission") actions during its meeting on April 11, 2019 with regard to compliance with Idaho's Open Meetings Law ("OML"). Two of the complaints in addition to questioning the PCSC's conduct, specifically requested that this office investigate the complaint. This office is assigned the duty to investigate complaints such as these by statute. This report contains the findings and analysis in fulfillment of that statutory responsibility, along with recommendations for the PCSC's consideration.

I. AUTHORITY AND SCOPE

This office is investigating this matter pursuant to the authority vested in the Attorney General under Idaho Code § 74-208(5) to enforce violations of the OML by

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public agencies of the state government. “Public agency” is defined to encompass various categories of governmental entities and subdivisions at all levels of government including, but not limited to, “[a]ny state . . . commission . . . created by or pursuant to statute” Idaho Code § 74-202(4). The PCSC is a state commission that is created by statute pursuant to Idaho Code § 33-5213. It is therefore a public agency within the meaning of the OML and subject to the enforcement authority of this office.

To avoid any conflict of interest, the investigation was conducted and this report was generated exclusively by staff within the Civil Litigation Division with no connection to the PCSC or its members. The PCSC is advised by a deputy attorney general within the Contracts and Administrative Law Division. Based upon the separate reporting and supervisory structures of these separate divisions, the investigation was “walled off” from the Deputy who regularly advises the PCSC. This “walling off” enabled the Civil Litigation Division to conduct a thorough and objective investigation of these complaints.

This office’s authority under Idaho Code § 74-208(5) extends only to an analysis of whether the OML was violated. That authority does not include an assessment of whether any other law may have been violated. It does not include an assessment of policy positions, the substance of any statements made by members of the PCSC, or conduct of members of the PCSC generally. Therefore, pursuant to that statutory authority, the scope of the investigation and this report are restricted to an analysis of whether probable cause exists for this office to bring a complaint for violating the OML against the PCSC. If any complainant believes that a law in addition to the OML has been violated, those violations should be reported to the appropriate law enforcement entities. *See* Idaho Code § 31-2227. This office has no authority or oversight over the substance or policy pronouncements of

the PCSC.¹ Any complaints regarding the policy positions or statements of the PCSC or its members should be addressed to the PCSC or its appointing authorities.

II. FACTS

On April 11, 2019, the PCSC held a public meeting. During that meeting, the PCSC went into executive session for approximately two hours. A Deputy Attorney General was present throughout the meeting including the executive session. The agenda for the meeting identifies the executive session as an item under the heading “E. OTHER.” The executive session is labeled, in relevant part:

- 5. Executive Session: Renewal Conditions Status Update
 - i. Pursuant to Idaho Code Section 74-206(1)(d), to consider records that are exempt from disclosure as provided in Chapter 1, title 74, Idaho Code.²

The agenda does not label the executive session as an action item.

There was a valid open meeting held prior to executive session. A motion was made to enter executive session by the presiding member of the PCSC. The presiding officer identified the consideration of records exempt from disclosure under subsection 74-206(1)(d) of the OML as the purpose for the executive session when he made the motion to enter executive session. A roll call vote was conducted in open session and it was unanimously approved. The vote of every member who participated was recorded in the minutes.

¹ On page 2 of the complaint filed by the Heritage Academy Public Charter School, there is an allegation seeking an investigation of “disparaging remarks.” This allegation is beyond the scope of this office’s authority. This office only evaluates whether the statements could be made within an executive session, not whether they are appropriate or reflect bias within the Commission. This complaint should be addressed to the Commission itself, or perhaps the Commission’s appointing authorities.

² The agenda for the meeting on April 11, 2019 originally cited “Chapter 3, title 9, Idaho Code.” The agenda was then amended to cite “Chapter 1, title 74, Idaho Code.” Our analysis is based on the amended agenda.

Chapter 1, title 74, contains Idaho's Public Records Act. The agenda, minutes and motion for executive session identify chapter 1, title 74, of the Idaho Code as the basis for the executive session. However, they do not identify Idaho Code § 74-104(1) ("public records exempt from disclosure by federal or state law"), which is the specific provision of the Public Records Act exempting the records under consideration in this case.

During executive session, staff provided the Commissioners with an update regarding the status of compliance with charter school renewal conditions. Several charter schools have renewal conditions related to student proficiency. In order to gauge progress toward compliance, staff presented the Commissioners with a PowerPoint presentation that included student data at several charter schools that would be considered for renewal in upcoming years. That data included, among other things, proficiency rates from state and national assessment results; special education data; demographic data; four-year aggregate cohort graduation rate ("ACGR") data that was not broken down by demographics; and student information related to degree, diploma, credential attainment, drop out data, attendance and mobility. The presentation of student data at a particular school occasionally juxtaposed or combined student data exempt from disclosure under Idaho Code § 33-133 and the federal Family Education Rights and Privacy Act ("FERPA") with data not exempt from disclosure.

The discussion focused on student data at several charter schools. However, on several occasions throughout the session, the discussion drifted to other topics that did not

involve consideration of student data. The most significant discussions that did not consider student data are as follows:³

- Commissioners' personal familiarity with a particular math instructor. The Commissioners discussed, among other things, that the instructor was married to a nephew of one of the commissioners, that she left a job because a charter school had given her a job offer she could not refuse, and that the instructor's father-in-law had medical issues. The discussion then drifted to the topic of schools that make financial commitments even though the school has no plan to fulfill those obligations.
- Criticism of a school in general and the town where the school is located. On several occasions during discussion of student data at a particular school, Commissioners interjected with comments about the school in general and the town where the school is located. These comments include statements such as "What do we do as a society with that town?" "Who would ever send their kids there?" "Would anyone in this room ever send their kids there?" One Commissioner suggested opening an ice cream shop and another responded, "ice cream doesn't grow brain cells." Another Commissioner remarked several minutes later during a discussion of a charter school in a neighboring town, "Man, if I lived in [the town where the school is located], I'd drive all the way out there!"
- Evaluation of the performance of a school administrator. The discussion of a school's student data drifted to a critical evaluation of the school's administrator. Commissioners discussed the administrator's name; that she is unhappy with the PCSC; that the administrator believed that the children in her school could never meet the renewal standard; that she does not believe charter schools should be better than traditional schools; that she does not think parents of the children at her school want a school that performs better than a traditional school; and that the administrator was happy that proficiency levels fell from 10% to 5% so that the school could receive more money.
- Evaluation of the performance of another school administrator. The discussion of a different school's student data drifted to a complementary evaluation of the performance of the administrator. Specifically, Commissioners and staff discussed that he is a former high school math instructor; that he has implemented looping instruction for fourth, fifth and sixth graders; that he has created a culture of experimentation at the school; and that he organized a field trip to the East Coast and worked through spring break.

³ This list is not meant to include every occasion during executive session in which a member of the PCSC made a statement unrelated to student data. It is meant to capture the occasions in which the most significant deviations in topic occurred for purposes of an analysis of whether, as a whole, the discussion during executive session complied with the OML.

- The process by which the PCSC would deny renewal of a school's charter. Specifically, on several occasions, the PCSC discussed how it should approach members of the legislature in advance of denial in order to achieve political buy-in. At different points during the executive session, they discussed how they could present student data to legislators without running afoul of Idaho Code; the process staff would undertake in advance of any such decision; the best way to prepare legislators for a possible decision that could result in a school's closure; and they discussed the risk of parents speaking out in favor of a school even though the data indicates the school is not serving their child's best interests.
- The success of the Montessori educational program generally. The PCSC's discussion of student data at a particular charter school drifted into general commentary about the difficulties created at schools where high school enrollment numbers are minimal compared to online enrollment such that the school's virtual program is paying for the on-site program. This discussion then drifted to the success of the Montessori program generally compared to other educational programs.

Neither the Deputy Attorney General nor members of the PCSC present during executive session spoke up or attempted to redirect the topic of conversation when the discussion drifted from consideration of exempt student data to these topics. At the end of the executive session, the Deputy Attorney General present advised the Commissioners to return to open session because they were done with the presentation of exempt material. After the session was over, the public session was reconvened and the meeting was properly adjourned.

III. ANALYSIS

The complaints allege that the PCSC violated the OML during executive session at a regular meeting on April 11, 2019. This office concludes that probable cause exists for this office to bring a complaint for violating the OML against the PCSC for the following:

- a. Failing to properly identify the executive session as an action item as required by Idaho Code § 74-204(4);

- b. Changing the topic within executive session to topics not identified as a basis for entering executive session as prohibited by Idaho Code § 74-206(2); and
- c. Discussing topics for which executive session is not provided as prohibited by Idaho Code § 74-206(2).

If any decisions or final actions stem from the alleged conduct in violation of the OML, those decisions or actions shall be set aside within a properly noticed and conducted meeting under the OML.⁴ The PCSC shall schedule a training on the OML within 60 days of the PCSC's acknowledgment of the violation(s) to be conducted by a representative of the Idaho Attorney General's Office. The public and press should be invited to observe this training.

1. The Agenda.

The agenda for the April 11, 2019 meeting is deficient in two ways. First, the agenda does not identify the executive session as an action item as required by Idaho Code § 74-204(4). In July of 2018 an amendment to the OML came into effect requiring an agenda item that requires a vote to be identified on the agenda as an "action item." *See* Idaho Code § 74-204(4); 2018 Idaho Sess. Laws 502-03 (H.B. 611). Executive sessions require a motion identifying the specific subsection authorizing the executive session, a roll call vote of the board members, and the vote recorded within the minutes. Idaho Code § 74-206(1). Executive sessions are therefore "action items" as defined under the OML and should be labeled as such in the agenda for any meeting in which they occur.

⁴ Based on the recording provided to this office, it does not appear that any decision or final action was taken, but this office recommends that the Commission closely evaluate its conduct in consultation with its attorney to be certain.

This office recognizes that this provision is relatively new and that the Commission may still be adjusting to its requirements. Therefore, this office recommends moving forward that the Commission clearly identify the motion to enter the executive session as an “action item” within future agendas. The Commission may want to take the additional step of reminding attendees that no action can or will be taken in the executive session, and that any necessary action will occur in open session in compliance with the OML.

Second, the agenda fails to adequately specify the basis for executive session. Idaho Code § 74-204(3) requires agendas for public meetings in which an executive session will be held to “state the reason and the specific provision of law authorizing the executive session.” The agenda item for the executive session appears under the heading “E. OTHER.” For purposes of clarity, agenda items for executive session should be offset and specifically identified with their own heading.

The provision of law authorizing the executive session identified in the agenda is: “Pursuant to Idaho Code Section 74-206(1)(d), to consider records that are exempt from disclosure as provided in Chapter 74, title 1, Idaho Code.” Though the agenda identifies the specific subsection of the OML authorizing the executive session, this office recommends that an agenda item for an executive session based on consideration of records exempt from disclosure should identify the specific provision(s) on which the exemption is based. Chapter 1, title 74 contains Idaho’s Public Records Act. A general reference to the Public Records Act does not provide a level of specificity consistent with the general agenda requirement that all topics of discussion be noted within the agenda. Identification of the public records exemption serves the purpose of providing notice to the public

regarding the substance of the executive session without breaching the confidentiality of the executive session.

2. The Executive Session.

Exceptions under the OML are to be construed narrowly. Idaho Code § 74-206(2). It is a violation of the OML “to change the subject within the executive session to one not identified within the motion to enter the executive session or to any topic for which an executive session is not provided.” Idaho Code § 74-206(2). The PCSC went into executive session for the purpose of considering student data exempt from public disclosure under state and federal law.⁵ Consideration of confidential student data is a proper basis for executive session.

However, it appears that the PCSC violated the OML during the executive session.⁶ On several occasions, the topic of discussion drifted from student data to topics that:

- (a) Are not topics for which an executive session is provided; and
- (b) Were not specifically identified in the motion for executive session.

Topics identified during investigation within this category include: the Commissioners’ personal familiarity with a particular math instructor; criticism of a school in general and the town where the school is located; the process by which the PCSC would deny renewal of a school’s charter and generate political buy-in for that decision; and the success of the Montessori educational program generally.

⁵ Both the Idaho Student Data Accessibility, Transparency and Accountability Act of 2014, (Idaho Code § 33-133) and the federal Family Education Rights and Privacy Act, 20 U.S.C. § 1232 (FERPA) protect personally identifiable information in student education records from public disclosure.

⁶ This office’s analysis does not include a discussion of every instance in which a comment was made by someone present during executive session that is not directly tied to the consideration of student data. Analysis considered the frequency and degree to which discussion throughout the session as a whole drifted to topics not appropriate for executive session.

This office's understanding of the student data indicates it is not rationally connected to these topics of discussion. Idaho Code § 74-206(2) expressly prohibits an entity from discussing "any topic for which an executive session is not provided." Therefore, these discussions should not have taken place within executive session. It is the frequency and degree of drift throughout the session as a whole that, in this office's view, constitutes a violation of the OML, particularly when considering the presumption of openness and narrow interpretation of exceptions to the law. Based upon the lengthy and meandering discussion within the executive session, it appears possible to identify numerous potential violations of the OML.

Also, on two different occasions during the executive session, the topic of discussion drifted from student data to an evaluation of the performance of administrators at two schools. The evaluation of an administrator of a public charter school is likely a proper basis for executive session under Idaho Code § 74-206(1)(b). But Idaho Code § 74-206(2) expressly limits executive sessions to those noticed on the agenda, and relied upon within the motion, and prohibits the changing of the topic within the executive session to one for which executive session is not provided. The only topic identified was consideration of exempt information under Idaho Code § 74-206(1)(d). No other topic was identified on the agenda or within the motion. Comparing the agenda and the motion to the topics actually discussed, it appears that this provision of the OML was violated.

Paramount within service on a government board is the responsibility to follow the law and speak up when others do not. In a setting such as an executive session, the duty of self-policing is at its highest. Through a wide-ranging and lengthy executive session, neither the Deputy Attorney General representing the Commission, any member of the

Commission, or any staff members present spoke up to advise the Commission to return to the proper topic. Late within the executive session, the Deputy Attorney General present encouraged the PCSC to go back into an open meeting because the executive session materials had been concluded. However, by that point the discussion during executive session had impermissibly drifted without corrective action. Although a failure to speak up within an executive session is not a violation of the OML, this office recommends empowering all attendees who are members of the Commission, attorneys, and other Commission staff members to speak up during executive sessions to keep the Commission on topic and avoid running afoul of the law.

IV. RECOMMENDATIONS

Recognizing that probable cause exists to bring a complaint against the PCSC, Idaho Code § 74-208(7) permits an entity such as the PCSC to “cure” a violation upon receipt of an alleged violation. This report constitutes notice to the PCSC of the alleged violation(s). This office recommends that the PCSC cure these violations consistent with the process set forth in Idaho Code § 74-208(7)(a) by taking the following actions immediately:

- Acknowledge publicly that it violated the OML during its meeting on April 11, 2019 by (a) failing to identify the executive session as an action item in the agenda; and (b) allowing the discussion during executive session to drift into several topics for which executive session is not provided and which were not identified in the motion for executive session.
- The PCSC shall schedule a training on the OML within 60 days of the PCSC’s acknowledgment of the violation(s) to be conducted by a representative of the

Idaho Attorney General's Office. The public and press should be invited to observe this training.

- If any decisions or final actions stem from the alleged conduct in violation of the OML, those decisions or actions shall be set aside within a properly noticed and conducted meeting under the OML.

In addition to the cure requirements above, this office recommends that the Commission consider the adoption of the following recommendations as best practices to enhance compliance with the OML:

- On future agendas:
 - Identify executive sessions as an “action item” in any agenda for a meeting in which they are expected to occur;
 - Offset agenda items for executive sessions separately and label them clearly; and
 - Identify the specific provision under the Idaho Public Records Act that provides the basis for the an executive session held pursuant to Idaho Code § 74-206(1)(d).
- This office makes the following recommendations to avoid topic drift during executive session:
 - Monitor the discussion and speak up to keep the discussion on topic;
 - Identify inappropriate departures from the exception under which the entity went into executive session;
 - Keep the discussion within the parameters of the exception under a narrow interpretation of its scope;

- Advise and assist those participating in the discussion to employ corrective action immediately when topic drift occurs; and
- Ensure that executive sessions are focused and as brief as possible.

The PCSC should notify this office within 14 days as to whether these recommendations are acceptable and establish a timetable for compliance. *See* Idaho Code § 74-208(7)(a)(ii). Failure to cure the alleged violations as outlined above will result in this office filing an Open Meetings Complaint under Idaho Code § 74-208(5).